

BB DEVELOPMENT, LLC

Site Location of Development Act // Natural Resources Protection Act
Phase I – Oxford Casino – Oxford

EXCERPTS FROM THE DEPARTMENT'S RECORD

- Interested persons correspondence received during Department review

Callahan, Beth

From: Callahan, Beth
Sent: Tuesday, January 25, 2011 10:58 AM
To: 'hoganpondlane@gmail.com'
Subject: Oxford ME Casino

Dear Mr. Auren,

Thank you for your comments and concerns regarding the proposed Oxford Resort Casino. At this time, a Site Location of Development Act application and a Natural Resource Protection Act application have been submitted and are pending review. The applications can be seen at the municipal town office, at the Department's office in Augusta, and on the Department's website at http://www.maine.gov/dep/blwq/docstand/sitelaw/Selected%20developments/2010/oxford_resort_casino/index.htm.

From your email, I understand your concerns are in relation to water quality and stormwater management within the watersheds of Hogan Pond and the Little Androscoggin River. According to the proposed site plans, the majority of the proposed project is in the watershed of the Little Androscoggin River; a small portion of the proposed project is in the watershed of Hogan Pond. At this time, the Department's Division of Watershed Management is reviewing the proposed project pursuant to the Department's Chapter 500 Stormwater Management Rules under the general and phosphorous standards. These rules can be seen at <http://www.maine.gov/dep/blwq/docstand/stormwater/storm.htm>.

In your email, you state that the Little Androscoggin River flows into Hogan Pond and Whitney Pond during heavy rain events. Unfortunately, the Department's scope of review is limited to the area of development within the proposed project's property boundaries. Therefore, the Department does not have jurisdiction to investigate this matter and does not have authority to use the direction of the Little Androscoggin River's surface water flow during heavy rain events as a basis for determining if permitting requirements have or have not been satisfied.

If you have any additional comments or questions, please feel free to contact me.

Sincerely,
BETH CALLAHAN
Project Manager
ME Dept. of Environmental Protection
Division of Land Resource Regulation

From: Richard Auren [mailto:hoganpondlane@gmail.com]
Sent: Saturday, January 15, 2011 12:14 PM
To: Dennis, Jeff
Subject: Fwd: Oxford ME Casino

Hello Jeff:

As you can see I've found you through an EPA contact. If you scroll down you can see why I'm contacting you. I'm not trying to cause trouble but I do have some serious concerns with effects the Maine casino may have on Hogan Pond. Is it possible to be kept up to date on this development and somehow be ensured that the state of Maine is monitoring this project and it's not just in the hands of Oxford's local government?

Thank you in advance

Forwarded conversation

Subject: Oxford ME Casino

From: **Richard Auren** <hoganpondlane@gmail.com>
Date: Thu, Jan 13, 2011 at 12:50 PM

1/25/2011

To: perkins.stephen@epa.gov

Hello Stephen

I'm not sure if you're the right person or even if the EPA is the right agency to contact but here's my concern.

Maine recently voted in a casino and purchased land in the town of Oxford on the top of Pigeon Hill to build it. At the bottom of the hill are two ponds namely Hogan Pond and Whitney Pond. I own property on Hogan Pond and I'm concerned that runoff from the casino is going to pollute the pond. I believe the casino property is actually on part of the Hogan Pond watershed and I know for fact that there are a handful of brooks that run off the hill into the pond.

I realize that the town of Oxford is supposed to police the development of this project but the town officials especially the town manager are so pro-casino my feeling is they will allow anything to be done just to get the thing built and built fast. The town has already started to change restrictions on building height etc just so the casino will adhere to the regulations. I truly believe we have the fox watching the hens here.

The casino company (Black Bear) has stated publicly that all runoff will be directed towards the Little Androscoggin river. Problem with this idea is when it rains heavy the Little Androscoggin actually flows into Hogan and Whitney Ponds not the other way around. For your reference, Black Bear has a web site that up and down mainecasino.com

Is there any way the EPA can step in and police this to ensure the integrity of these ponds?

Thank You In Advance

From: <Perkins.Stephen@epamail.epa.gov>
Date: Fri, Jan 14, 2011 at 7:09 AM
To: Richard Auren <hoganpondlane@gmail.com>

Richard,
Maine DEP's Water Bureau administers the Clean Water Act programs in ME and is the place for you to direct your concerns. I would expect that this type/size of development will need a number of state permits. You may want to have DEP let you know when the development applies for these permits so that you can review and comment on them before they are issued.
I hope you find this helpful.
Stephen

Please only print if necessary

From: Richard Auren <hoganpondlane@gmail.com>
To: Stephen Perkins/R1/USEPA/US@EPA
Date: 01/13/2011 12:50 PM
Subject: Oxford ME Casino

1/25/2011

Callahan, Beth

From: Callahan, Beth
Sent: Wednesday, February 16, 2011 10:59 AM
To: 'bob@main-landdevelopment.com'; Rob Lally BBE
Subject: Email to interested party

From: Callahan, Beth
Sent: Wednesday, February 16, 2011 10:58 AM
To: 'Terri Marin'
Subject: RE: Oxford casino - SW review

Dear Ms. Marin,

Thank you for contacting the Department with your questions and concerns relating to the pending application for Phase I of the Oxford Resort Casino in the Town of Oxford. Phase I consists of a 65,000 square foot building, parking, two entrances, and on-site utilities. At this time, the application is being reviewed pursuant to the Site Location of Development Act and Tier 2 level of review of the Natural Resources Protection Act. A copy of the applications can be seen at the Oxford town office, at the Department's office in Augusta, and on the Department's website at <http://www.maine.gov/dep/blwg/docstand/sitelaw/Selected%20developments/index.htm>. Please click on the fifth bulleted item, entitled "Oxford Resort Casino, Oxford".

According to Section 12 of the application (Stormwater Management), stormwater from the applicant's property (approximately 97.3 acres) flows in 2 main directions. A large part of the property drains into Hogan Pond. The proposed project consists of 12.9 acres of impervious area and 27.6 acres of developed area. Due to its proposed location of the parcel, the applicant states that the majority of the proposed project is within the watershed of the Little Androscoggin River. The Department's Division of Watershed Management reviewed the applicant's stormwater management plan under the basic, general/phosphorous, and flooding standards set forth in Chapter 500 of the Department's Stormwater Management Rules. The Division of Watershed Management determined the applicant's stormwater management plan to be acceptable.

According to project plans, Winter Brook and Tripp Lake will not receive stormwater from the proposed project. The applicant states that a small portion of Rabbit Valley Road is within the proposed project's watershed (The majority of Rabbit Valley Road is not in the proposed project's watershed.). The applicant has proposed to catch this stormwater runoff and send it through a wet pond for treatment. Treated stormwater will then flow to the Androscoggin River.

Your email mentions that Whitney Pond and Hogan Pond have been known to back-up and reverse its flow during spring/high water. I do believe that this is a valid concern. However, my scope of review is limited to the area of development within the boundaries of the applicant's property. I do not have jurisdiction to investigate this matter as it relates to the proposed project, and I do not have authority to use this matter as a basis for determining if permitting requirements have or have not been satisfied. However, from my understanding, there is a dam that controls the water levels of Whitney Pond and Hogan Pond, which may or may not be the source of the issue. I would encourage you to contact Dana Murch of the Department's Division of Water Quality Management to find out more information about how water levels are regulated and see if he is familiar with the dam at Whitney Pond and Hogan Pond. I'm sure Dana would be very willing to help with this issue. He may be reached at Dana.P.Murch@maine.gov or at (207) 287-7784.

Thank you again for your email, and please feel free to contact me with any additional questions or concerns.

Sincerely,
BETH CALLAHAN
Project Manager
ME Dept. of Environmental Protection
Division of Land Resource Regulation

From: Terri Marin [mailto:tmarin@kidsconsortium.org]
Sent: Tuesday, February 15, 2011 11:20 AM
To: Callahan, Beth

2/16/2011

Cc: stevehinchman@gmail.com; Rich Auren

Subject: FW: Oxford casino - SW review

Hi Beth,

I am a volunteer lake monitor and president of the Green and Mirror Ponds Association.
(the two ponds just south of Hogan and Whitney)

I have been reviewing materials with Steve.

Is there a reason why Winter Brook isn't included with the site plan watershed area?

Winter Brook flows out of Tripp into Hogan and is directly effected by the erosion on Rabbit Valley Road.

Also, Whitney and Hogan have been known to "back-up" and "reverse" it's flow during spring/high water...which then effects Tripp Lake.

Your insights would be helpful.

Thanks,

Terri

Terri Coolidge Marin, Administrative Manager

KIDS Consortium

223 Main Street

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tmarin@kidsconsortium.org

<http://www.kidsconsortium.org>

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----- Forwarded Message

From: Steve Hinchman <stevehinchman@gmail.com>

Date: Tue, 15 Feb 2011 10:15:30 -0500

To: tmarin@kidsconsortium.org

Subject: Fwd: Oxford casino - SW review

Beth.Callahan@maine.gov>

----- End of Forwarded Message

Callahan, Beth

From: Steve Hinchman [stevehinchman@gmail.com]
Sent: Friday, March 11, 2011 4:39 PM
To: Callahan, Beth
Cc: Ann Williams; Greg Dain; Neil Ward
Subject: Re: Emailing: BB Development, LLC. L25203AN&BN draft letter.doc

Attachments: Petition to EPA.Feb 7.2011.pdf; ATT3739062.txt; Supplemental Letter to EPA.pdf;
ATT3739064.txt



Petition to EPA.Feb 7.2011.pdf... (66 B) Supplemental Letter ATT3739064.txt
to EPA.pdf... (650 B)

Dear Ms. Callahan,

On behalf of the Androscoggin River Alliance ("ARA"), I am submitting for the record in BB Development, LLC's above-listed federal and state permit applications for the Oxford Resort Casino, copies of ARA's petition to the U.S. Environmental Protection Agency ("EPA") regarding the ongoing conflict of interest involving Department of Environmental Protection ("DEP") Commissioner Darryl Brown.

As documented in the attached files, Commissioner Brown is the sole owner of the firm that is acting as agent for BB Development, LLC, regarding these permits. As such, he has an irreconcilable conflict of interest in this matter and his appointment as chief administrative officer of DEP likely violates federal and state law. This deprives the Commissioner of authority to issue permits in this case or to delegate such authority. Under Maine law, so long as this conflict of interest remains, it appears that the only entity eligible to consider this application would be the Board of Environmental Protection.

For this reason, ARA opposes issuance of the draft permits as proposed. Additionally, we request that MDEP obtain guidance from EPA regarding its ability to issue any permits pursuant to the federal Clean Air Act or Clean Water Act in this case (EPA is cc'd on this email).

ARA appreciates the opportunity to comment. Please let me know if I can answer any questions, provide further information, or if you have any difficulty opening the attached files.

-- Steve

Stephen F. Hinchman, Esq.
537 Fosters Point Road
West Bath, ME 04530
207.837.8637

SteveHinchman@gmail.com

STEPHEN F. HINCHMAN
ATTORNEY AT LAW

February 7, 2011

Lisa P. Jackson, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Petition to Investigate Potential Violations of the Federal Clean Water Act That
May Require Withdrawal of Approval for the Maine Department of Environmental
Protection to Administer NPDES Permitting.

Dear Administrator Jackson,

By this letter, the Androscoggin River Alliance (“ARA”) hereby petitions you to investigate possible violations of the federal Clean Water Act (the “Act”) that may require withdrawal of approval for the Maine Department of Environmental Protection (“MDEP”) to administer the National Pollution Discharge Elimination System (“NPDES”) in Maine. This petition is filed pursuant to 40 C.F.R. § 123.64.

ARA is a citizens’ organization dedicated to the protection and restoration of the Androscoggin River. ARA is headquartered in Lewiston, Maine, and has the mission to “work together with individuals, other organizations, and federal, state, and local governments for a healthy river, good jobs, and strong communities, and to give the citizens of the Androscoggin River Valley a collective voice in the future of the river’s policy, planning, and management.” Since its formation in 2004, ARA has participated in most Clean Water Act NPDES permit and other regulatory proceedings involving the Androscoggin River. In 2005, ARA filed appeals challenging MDEP-issued NPDES permits for several paper mills that discharge pollutants into the Androscoggin River. ARA has also been involved in efforts to reduce stormwater discharges to the river, to improve the water quality of Gulf Island Pond (an impoundment on the River), to restore native fish populations, and matters involving water quality standards evaluation, triennial review of standards, anti-degradation rules, and proposals to upgrade standards.

As grounds for this action, Petitioners allege that the appointment of Darryl Brown as Commissioner of MDEP violates § 304(i) of the Clean Water Act, which expressly prohibits persons employed by regulated dischargers from overseeing state agencies that administer NPDES permitting. Specifically, § 304(i) provides that

no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit.

33 U.S.C. § 1314(i)(2)(D). *See also* 40 C.F.R. § 123.25(c) (same). The definition of a “[b]oard

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or body includes any individual, including the Director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.” 40 C.F.R. § 123.25(c)(1)(i). “Director” means the “chief administrative officer of any State ... agency operating an ‘approved program.’” *Id.* § 122.2. “Significant portion of income means 10 percent or more of gross personal income for a calendar year.” *Id.* § 123.25(c)(1)(ii). A “permit means an authorization, license, or equivalent control document issued by EPA or an ‘approved State’ to implement [40 C.F.R. sections 122, 123, and 124, and] includes an NEPDES ‘general permit.’” *Id.* § 122.2.

This provision is a fundamental procedural safeguard of the Act and was crafted by Congress to ensure that state agencies fully comply with the federal mandate to protect the nation’s waters. Under the Act and EPA rules, compliance with this provision is a mandatory prerequisite for a state to administer NPDES permitting, *see* 33 U.S.C. § 1342(c)(1) (state programs must confirm to § 1314(i)(2)); 40 C.F.R. § 123.25(c) (same), and failure to meet the rules automatically renders a state ineligible to administer the federal permitting program. 33 U.S.C. § 1342(c)(2) (“Any State permit program ... shall at all times be in accordance with ... guidelines promulgated pursuant to section 1314(i)(2)”; 40 C.F.R. § 123.1(f) (“Any State program approved by the administrator shall at all times be conducted in accordance with the requirements of this part.”). *See also id.* § 123.63(a) (failure to comply with requirements for State programs or to take corrective action is grounds for withdrawal of program approval).

Under Maine law, the Commissioner is the statutorily designated “chief administrative officer” of MDEP, 38 M.R.S.A § 342(1-A), and is directly responsible for issuing federal Clean Water Act discharge permits in the state. *Id.* § 344(2-A). Accordingly, pursuant to the federal statute and rules cited above, the Commissioner may not receive, either now or at any time during the previous two years, more than 10 percent of his personal income directly or indirectly from clients that hold or are applying for permits under the Clean Water Act.

With the swearing in last week of Darryl Brown to serve as the new Commissioner of MDEP, Maine appears to have violated the above rule. Mr. Brown is the founder, sole stockholder and, prior to Jan. 25, 2011, was the President of Main-Land Development Consultants, Inc. (“MLDC”). MLDC describes itself as “a multi-disciplined firm that has the ability to provide comprehensive land use planning services” for large development projects.¹ Its services include handling all municipal, state, and federal permitting, including permits under the Clean Water Act issued by MDEP and overseen by EPA.² As described on the MLDC web page, MLDC has handled environmental permitting applications for a range of large projects, including the recently proposed Oxford Casino, Saddleback Mountain Ski Resort, Belgrade

¹ *See* <http://main-landdevelopment.com/mission.html>.

² *See* <http://main-landdevelopment.com/permitting.html>.

³ *See* <http://main-landdevelopment.com/permitting.html>.

⁴ MLDC’s multi-volume permit application for the Oxford Casino is available at: http://maine.gov/dep/blwq/docstand/sitelaw/Selected%20developments/2010/oxford_resort_casi.

Lakes Golf Club, The Peaks subdivision at Sunday River, and Hancock Lumber Company's Bridgeton and Windham Lumber Yards.³

On Dec. 16, 2010, while Darryl Brown was still President of MLDC, MLDC submitted permit applications to MDEP on behalf of BB Development, LLC, to build a \$165 million, four-season resort and gaming facility in Oxford County, Maine. The multi-phase project will include a casino with slot machine and table gaming, a 200-unit hotel, dining and entertainment facilities and an outdoor activity center.⁴ The application states that MLDC is acting as lead developer and agent for BB Development LLC in the permitting process, which includes an application for a Maine Construction General Permit pursuant to Section 402(p) of the Clean Water Act.⁵

With Mr. Brown's appointment as Commissioner of MDEP, he is now simultaneously the sole owner of the company acting as lead developer and permitting agent for one of the largest ongoing development projects in Maine *and* chief administrative officer of the agency responsible for reviewing permit applications for that project. Even if he recuses himself from the permit decision itself, Commissioner Brown stands to directly and substantially profit from his company's work with the rules, staff and administrative process he oversees. This is a clear violation of the federal Clean Water Act provisions barring a state agency director from receiving substantial income from permit applicants or permit holders. 33 U.S.C. § 1314(i)(2).

The Oxford Casino, however, is not the only issue. The Saddleback Mountain Ski Resort received permits in 2007 to begin a 10-year, 8,000-acre expansion, including a new ski lodge, lifts, ski trails, condominiums and a vacation home subdivision. MLDC's website states that it has provided comprehensive design and engineering services for the ongoing expansion and has been "heavily involved in the environmental permitting for this very large project."⁶ Those permits include stormwater discharge licenses issued pursuant to § 402(p) of the Act.

On information and belief, for the reasons explained below, many of MLDC's other clients also hold permits or are applicants for permits under the Act. Pursuant to federal and state rules, a § 402(p) Construction General Permit is required for all

³ See <http://main-landdevelopment.com/project-list.html>.

⁴ MLDC's multi-volume permit application for the Oxford Casino is available at: http://maine.gov/dep/blwq/docstand/sitelaw/Selected%20developments/2010/oxford_resort_casino/index.htm.

⁵ See http://maine.gov/dep/blwq/docstand/sitelaw/Selected%20developments/2010/oxford_resort_casino/Site%20Location/Volume%201/00-03%20Forms%20and%20Authorization.pdf.

⁶ See <http://www.main-landdevelopment.com/project-list.html>.

[c]onstruction activity including one acre or more of disturbed area, or activity with less than one acre of total land area that is part of a common plan of development or sale, if the common plan of development or sale will ultimately disturb equal to or greater than one acre

Maine Construction General Permit, Part II(A) (2006).⁷ Because the Maine Site Law of Development Act (“Site Law”) has a three-acre threshold for permit jurisdiction, all projects subject to the Site Law also require Clean Water Act stormwater discharge permits. Co-jurisdiction also applies to all projects requiring a Maine Stormwater Management permit or an individual permit under the Maine Natural Resources Protection Act (“NRPA”) and for many projects requiring a NRPA Tier II permit.

As stated on its web page, most of MLDC’s large clients require Site Law, Stormwater, and/or NRPA permits. By definition, most of those clients therefore also require Clean Water Act discharge permits pursuant to § 402(p) of the Act. During his nomination hearings on Jan. 25, 2011, Commissioner Brown stated that MLDC handles approximately 8 permitting actions before DEP annually, and that “25 to 35 percent of MLDC’s work is DEP-related.”⁸ Thus, it is reasonable to conclude that a substantial portion of MLDC’s earnings are from clients that hold or are seeking permits under the Clean Water Act.⁹

Mr. Brown is the sole stockholder of MLDC, and, until resigning on or about Jan. 25, 2011 was President of MLDC. Thus, it is highly likely that he has received over the last two years, and may receive in 2011, more than 10 percent of his income from clients that are either permit holders or applicants. Indeed, in his 2010 income disclosure statement published by the Maine Ethics Commission, Mr. Brown lists “permitting” as a “major area of economic activity” in his work with MLDC.¹⁰ Mr. Brown further states that he has practiced before MDEP

⁷ See <http://www.maine.gov/dep/blwq/docstand/stormwater/2006mcgptext.pdf>.

⁸ Statement of Darryl Brown, DEP Nomination Hearings Before the Joint Committee on Environment and Natural Resources, at 1:37:29 (Jan. 25, 2011), available at: <http://dl.dropbox.com/u/7503413/EPA%20Petition/MZ000003.MP3>.

⁹ MLDC also provides extensive services – such as surveying, engineering, design, GIS, construction oversight, sewer system design and rehabilitation, roadwork, budgeting and funding documents, etc. – for projects that may not require permits but nonetheless are for clients that hold permits. See, e.g., MLDC’s description of its municipal services at <http://www.main-landdevelopment.com/municipal-services.html>. Pursuant to 40 C.F.R. § 123.25(c), all income from any client that holds a permit or is applying for a permit must be included in the conflict of interest analysis without regard to the services rendered.

¹⁰ See D. Brown, *Appointed Employees 2010 Initial Statement of Sources of Income, Part 2* (Jan. 31, 2011), available at <http://www.maine.gov/ethics/pdf/soi/2010/exec/BROWN.D.pdf>.

"representing clients on behalf of my company."¹¹ Mr. Brown has also has been quite forthright in explaining that the DEP Commissioner's salary of \$102,000 per year will be a significant reduction from his earnings at MLDC.¹²

Petitioners respectfully contend that the above information provides sufficient grounds to commence an investigation to determine whether Mr. Brown's appointment as Commissioner of MDEP violates the Clean Water Act, 33 U.S.C. §§ 1314(i)(2)(D), 1342(c)(2), and to require the state to immediately take corrective action if a violation is found.

We appreciate your consideration of this matter and look forward to a speedy resolution. Please contact me at the address above if you have questions, concerns or comments regarding this Petition.

Sincerely,



Stephen F. Hinchman, Esq., for the
Androscoggin River Alliance

Cc: Darryl Brown, Commissioner MDEP
Gov. Paul LePage, Governor of Maine
William J. Schneider, Attorney General of Maine
Curt Spaling, Regional Administrator EPA Region 1

Enclosure: Letter to Commissioner Darryl Brown, Feb. 7, 2011

¹¹ *Id.*, at Part 7.

¹² See, e.g., http://www.pressherald.com/news/overcoming-critics-brown-is-sworn-in-as-environmental-chief_2011-02-02.html; http://www.pressherald.com/news/self-described-conservationist-draws-bead-on-dep-attitude_2011-01-30.html.

STEPHEN F. HINCHMAN

ATTORNEY AT LAW

February 16, 2011

Lisa P Jackson, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Petition to Investigate Potential Violations of the Federal Clean Water Act That May Require Withdrawal of Approval for the Maine Department of Environmental Protection to Administer NPDES Permitting

Dear Administrator Jackson,

The Androscoggin River Alliance hereby supplements its Feb. 7, 2011 *Petition to Investigate Potential Violations of the Federal Clean Water Act That May Require Withdrawal of Approval for the Maine Department of Environmental Protection to Administer NPDES Permitting* (the "Petition"), with the following documentation and comments.

SUPPLEMENTAL STATEMENT OF FACTS:

1. The Petition stated that Darryl Brown is the founder and sole stockholder of Main-Land Development Consultants, Inc. ("MLDC"). This information comes from statements of Mr. Brown at his Jan. 25, 2011 confirmation hearings before the Maine Legislature's Joint Standing Committee on the Environment and Natural Resources, (audio recording available at: <http://dl.dropbox.com/u/7503413/EPA%20Petition/MZ000003.MP3>, at 27:10); and from MLDC's statements on its web site. (See Exhibit 1).
2. In December 2010, MLDC filed for state and federal permits for the Oxford Resort Casino ("Oxford Casino") on behalf of BB Development, LLC ("BB Development"). The permit application was prepared and submitted by MLDC. (See Oxford Resort Casino, Site Law Permit Application ("Casino Application"), Cover Letter, attached as Exhibit 2).
3. The Oxford Casino permit application includes a letter from BB Development appointing MLDC as their "authorized agent and representative for the OXFORD RESORT CASINO" and stating that "MLDC is authorized to pursue local, state, and federal permitting, including signing application forms." (See Casino Application, Forms and Authorization, pp. 1 & 3, attached as Exhibit 3).
4. The Oxford Casino permit application includes a signed "Notice of Intent to Comply with the Maine Construction General Permit," signed by Robert Berry of MLDC as "agent" for BB Development, LLC. (See Casino Application, Forms and Authorization, page 2, attached as Exhibit 3).

5. The Oxford Casino permit application, Section 4(A) "Prior Experience", states that MLDC has been retained as the "Primary Land Consultant"; that MLDC will "perform the site-civil, engineering, surveying, and permitting"; and that the "applicant has retained the services of other land consultants that work through Main-Land, including Sweet Associates, Summit Geoengineering Services, Kenneth G. Stratton, and Land Design Solutions." (See Casino Application, Section 4: Technical Ability, page 1, attached as Exhibit 4).
6. In describing MLDC's technical ability, the Casino Application, Section 4(A): "Prior Experience", further states:

MAIN-LAND has been providing site permitting consulting services since their inception in 1974. Some projects completed through this process in recent times include; The Peaks Subdivision, in Newry; Scotty Brook at Black Mountain, in Rumford; Ease Auburn Baptist Church, in Auburn; Hillside Condominiums at Mt. Abram, in Greenwood; and Winter Park Subdivision in Bethel.

(See Casino Application, Section 4: Technical Ability, page 1, attached as Exhibit 4).

7. The Casino Application, Section 4(B) "Personnel", states that "the following consultants have assisted in the development of this project to date [Dec. 22, 2010]: Darryl N. Brown, C.S.S. #9 – Maine-Land Development Consultants. . . ." (See Casino Application, Section 4: Technical Ability, page 3, attached as Exhibit 4). Three other MLDC staff members and many MLDC subcontractors are also listed. (*Id.*)
8. Mr. Brown's Professional Resume is attached to Section 4 of the Casino Application. The resume states that Mr. Brown is "President and Owner of Main-Land Development Consultants working in capacity of Registered Soil Scientist and Licensed Site Evaluator." (See Casino Application, Section 4: Technical Ability, page 4, attached as Exhibit 4).
9. Darryl Brown's 2010 income statement submitted to the Maine Ethics Commission states that in 2010 he received self-employment income and dividend distributions from MLDC, and that he represented MLDC in permit proceedings before the Maine Department of Environmental Protection. (See D. Brown, Appointed Employees 2010 Initial Statement of Sources of Income (Jan. 31, 2011), attached as Exhibit 5).
10. Darryl Brown's 2010 income statement submitted to the Maine Ethics Commission states that he is a Board Member of the Maine Rural Water Association ("MRWA") and the National Rural Water Association. (See D. Brown, Appointed Employees 2010 Initial Statement of Sources of Income (Jan. 31, 2011), attached as Exhibit 5). The MRWA is a trade association of rural water and sewer districts that provides a variety of services, including lobbying the state legislature and state agencies regarding legislation, rules and regulations that affect its members. (See MRWA web pages, attached as Exhibit 6). The NRWA is a trade association of rural water and sewer districts that provides a variety of services, including lobbying the federal legislature and agencies regarding legislation, rules and regulations that affect its members. (See NRWA web pages, attached as Exhibit 6).

11. The MLDC web site has described Darryl Brown's background as follows:

Darryl performs a wide range of work at Main-Land, from soil testing for small residential septic systems to adding his considerable experience on multi-million dollar developments, in addition to his duties as President.

Darryl has consulted on many high-profile projects, including:

- Saddleback Ski Resort- Dallas Plantation, Maine
- Mt. Abrams Family Ski Resort- Greenwood, Maine
- Powder Ridge Subdivision- a 99 lot residential subdivision in Newry, Maine
- Scotty Brook at Black Mountain- a 308 unit mixed residential subdivision in Rumford
- Belgrade Lakes Golf Course

(See MLDC web pages, attached as Exhibit 7). Most, if not all of these projects hold permits under Section 402 of the Clean Water Act.

12. In 2009, the MLDC web site listed the following "Recent Projects":

- Crab Apple Whitewater
- University of Maine @ Farmington
- Rangeley Lakes Heritage Trust
- International Paper
- MEAD Paper
- Turner Highlands Golf Course
- Franklin Memorial Hospital
- First Baptist Church Livermore Falls
- Oxford Hills Growth Council

(See MLDC web pages, attached as Exhibit 7). Most of these projects hold permits under Section 402 of the Clean Water Act.

13. In 2010, the MLDC web site listed the following "Recent Projects":

- Oxford Resort Casino
- Saddleback Mountain Ski Resort
- Belgrade Lakes Golf Club
- The Peaks
- Round Pond Maine
- Moose Landing Marina
- Camp Micah

- Hancock Lumber Company

(See MLDC web pages, attached as Exhibit 7). Most of these projects hold permits under Section 402 of the Clean Water Act.

14. In the last two years, MLDC applied for and obtained Maine DEP stormwater permits (for which a Section 402 Permit is also required) for the following projects:

- Don & Sandi Dumont, 13-unit subdivision and road project in Rangeley, ME. DEP ID# 025006 (8/30/10).
- Long Lake Sport Lodges & Marina LLC, 22-unit subdivision and road project in St. Agatha, ME. DEP ID# 24957 (6/30/10).
- Maine Quality Homes, LLC, a 6-unit subdivision and road project in Windham, ME. DEP ID# 024889 (5/25/10).
- Waterford Properties, 12-unit subdivision and road project in Waterford, ME. DEP ID# 024837 (3/29/10).
- Archie's Inc., road construction to access subdivision in Weld, ME. DEP ID# 24791 (1/20/10).
- Leonard McIntyre Construction, Inc., 14-unit condominium and road project in Bridgton, ME. DEP ID # 024055 (5/15/09).
- L & R Logging LLC, amendment to prior permit, Otisfield, ME. DEP ID# 24335 (3/20/09).

(See MLDC Permits, 2009-2010, attached as Exhibit 8. This exhibit is compiled from Maine DEP, *Issued Site Law and Stormwater Permits, 2006-2010*, Google Earth Interactive Maps and Data, available at <http://www.maine.gov/dep/gis/datamaps/>. Additional MLDC applications for the years 2006-2008 are also listed).

15. Commissioner Brown has stated to the press that at the time of his swearing in as Commissioner, he was unaware of the conflict of interest provisions of the Clean Water Act, 33 U.S.C. § 1314(i)(2)(D) and the Environmental Protection Agency ("EPA") Rules, 40 C.F.R. § 123.25(c), which are replicated in Maine law at 38 M.R.S.A § 341-A(3). (See Bill Nemitz, "Muskie casts long shadow on DEP's man," *Portland Press Herald* (Feb. 11, 2011), attached as Exhibit 9).

16. During the course of his nomination hearings, no party questioned whether Mr. Brown met the personnel qualifications at 40 C.F.R. § 123.25(c) and 38 M.R.S.A § 341-A(3), and the issue was never addressed publicly by Mr. Brown, the Governor's counsel, members of the Environment and Natural Resources Committee, or the public.

DISCUSSION

The Clean Water Act sets a national goal to restore and maintain the chemical, physical and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). To meet these goals, the act directs the EPA and, if approved by EPA, state pollution control agencies to impose effluent

limitations on point source dischargers. 33 U.S.C. § 1342. In order to ensure the agencies fulfill this mission, the CWA includes numerous procedural safeguards. One of those precautions is Section 304(i)(2)(D), which prohibits “any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit” from serving in a position with authority to issue permits. 33 U.S.C. § 1314(i)(2)(D).

This conflict of interest rule was not in the original Senate draft of the Clean Water Act, and was added to the House of Representatives draft amendments after concerns surfaced that a majority of state pollution control boards included representatives of the very industries and local governmental agencies the act was designed to regulate. *See* 118 Cong. Rec. 12432 (*quoting* H.R. Rep. No. 92-1465 (1972); 118 Cong. Rec. 33757. The House amendment was adopted by the House-Senate Conference Committee and ultimately approved by Congress.¹ As Rep. John Dingell of Michigan explained to his colleagues during debates on the House floor:

While the individuals [with a conflict] can be of a very high caliber, they basically represent polluters on the board. They represent a constituency and the constituency includes the people or organizations the commission is set up to regulate.

The conference bill is aimed at this very problem. It is intended to wipe out all industry representation on any water pollution control board or similar body that has anything to do with issuing, denying, or conditioning permits under the authority of section 402 of the bill. It is a condition precedent to any State obtaining the power under section 402 to issue permits. Even one such representative shall not be allowed because of the potential that the board will consider permits of which he has an income interest.

118 Cong. Rec. 33757 (statement of Rep. Dingell), attached as Exhibit 10.

Petitioners have alleged that the appointment of Darryl Brown as Commissioner of MDEP may violate § 304(i) of the Clean Water Act. Based on the facts presented above and in the Petition, it is clear that Commissioner Brown has spent his career working for and representing the very permit holders and permit applicants he is now charged with regulating. This directly contradicts the intent of Congress that industry representatives not be allowed to have “anything to do with issuing, denying, or conditioning permits under the authority of section 402.” *Id.*

Moreover, Commissioner Brown also has a significant ongoing conflict of interest regarding “permits of which he has an income interest.” *Id.* Commissioner Brown is the sole owner of Maine-Land Development Consultants, Inc., which is currently serving as the primary consultant and permitting agent for the \$165 Oxford Resort Casino project. MLDC has filed for a § 402 application on behalf of the Oxford Casino, and that application remains pending before

¹ In the original version of the Clean Water Act, the conflict of interest provision was in § 304(h)(2)(D), and was bumped to § 304(i)(2)(D) by a subsequent amendment.

MDEP. In the days and weeks before his confirmation, Commissioner Brown served as a consultant on the project. While the Commissioner resigned as President of MLDC just prior to his confirmation, he remains the company's sole shareholder.

Additionally, the evidence shows that MLDC has also served as lead consultant and/or permitting agent for many other projects requiring a § 402 permit, including at least seven projects that received permits in 2009 or 2010. Data on projects with pending permit applications is not currently available to Petitioners, however MLDC's web site continues to advertise its services to applicants seeking permits for land development, construction, road building, and water, sewer and municipal services, etc. (see Exhibit 7) – all activities which require a Clean Water Act § 402 permit. The Commissioner has also stated that 25 to 35 percent of MLDC's business is DEP-related. (*See* Petition at 4.)

Despite Commissioner Brown's extensive history working in the land development and permitting field – and his ongoing status as sole owner of MLDC – there is no indication that the Commissioner or anyone else ever evaluated whether his appointment as Commissioner would violate § 304(i) of the Clean Water Act or the parallel state provisions. In fact, the Commissioner has stated to the press that he was not aware of the conflict of interest rules at the time of his swearing in.

Petitioners respectfully submit that they have provided *prima facie* evidence that Commissioner Brown has a substantial and ongoing conflict of interest in contradiction of § 304(i), and that this evidence warrants investigation by EPA. To aid EPA's conflict of interest review, Petitioners offer the following suggestions and comments.

A. AS AGENT FOR A PERMIT APPLICANT, MLDC HAS THE SAME INTERESTS AS AN APPLICANT AND MUST BE TREATED AS AN APPLICANT FOR PURPOSES OF THE CLEAN WATER ACT SECTION 304(i) CONFLICT OF INTEREST REVIEW, 40 C.F.R. § 123.25(C).

As the permitting agent for BB Development's Oxford Resort Casino, MLDC is the legal equivalent of a "permit applicant" and should be treated as an applicant for the purposes of the 40 C.F.R. § 123.25(c) conflict of interest review. By preparing, submitting, certifying, and signing the Maine Construction General Permit as the designated agent for BB Development, MLDC is, literally, applying for a permit. Furthermore, in submitting the application, Robert Berry, on behalf of MLDC, certified *his* intent, as lead developer, to comply with the permit requirements:

With this Site Law application form and *my* signature, *I* am filing notice of *my* intent to carry out work which meets the requirements of the Maine Construction General Permit (MCGP). *I* have read and will comply with all of the MCGP standards.

(Exhibit 2) (emphasis added). In short, for purposes of the permit application, MLDC and BB Development are legally indistinguishable. This is consistent with EPA rules defining a

“person” subject to the NPDES permitting requirements to include an “agent” to a covered person. *See* 40 C.F.R. § 122.2 (A person “means an individual, association, partnership, corporation . . . or an agent or employee thereof.”). This merger of identity between an applicant for a permit and an agent for the applicant is particularly true when the agent and not the applicant signs the application. *See* 40 C.F.R. § 122.22 (all permit applications “shall” be signed by the responsible corporate officer or by a general partner).

This merger of identity is also consistent with the common law of agency, in which the agent owes a fiduciary duty to the principal and the agent is wholly and continuously subject to the principal’s control:

An agency is a fiduciary relationship “which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent by the other so to act.” *Perry v. H.O. Perry & Son Co.*, 1998 ME 131, ¶ 7, 711 A.2d 1303, 1305. An agency arises from an “agreement that one party will act on behalf of, and subject to the control of the other.” *Page v. Boone's Transp., Ltd.*, 1998 ME 105, ¶ 5, 710 A.2d 256, 257. “It is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries.” *Id.*

J&E Air, Inc. v. State Tax Assessor, 2001 ME 95 ¶ 14, 773 A. 2d 452, 456 (Me 2001); *see also Combined Energies v. CCI, Inc.*, 628 F. Supp. 2d 226, 231 (D. Maine, 2009) (same).

In sum, both the EPA rules and the common law merge the identity of a permit applicant and agent – they are treated as one and the same. If the applicant and agent are one for purposes of a permit application in part 122 of the EPA rules, they must also be so for purposes of the conflict of interest rules in part 123. Indeed, because MLDC formally represents the applicant’s interests in the permit proceeding, because MLDC owes a fiduciary duty to the applicant, and because MLDC acts subject to the will and continuous control of the applicant, it has no interests in the proceeding other than those of the applicant. Therefore, for purposes of the conflict of interest review, EPA should treat MLDC as an applicant for a permit. Anything less would be to ignore the fact that MLDC would be legally liable to its principal should it fail to act in the principal’s best interests or should it act contrary to the principal’s will.

B. ALL INCOME FROM A REGULATED ENTITY MUST BE CONSIDERED IN THE SECTION 304(i) CONFLICT OF INTEREST REVIEW.

Pursuant to statute and rule, the conflict of interest review must be based on “gross personal income,” 40 C.F.R. § 123.25(c)(1)(ii), received “directly or indirectly from permit holders or applicants for a permit.” 33 U.S.C. § 1314(i)(2)(D). The text of these provisions plainly requires inclusion of all income received from a permit applicant or holder – not just income for work on permit applications. This makes sense because a conflict of interest occurs when there is an *economic relationship* between the Commissioner and a regulated entity. It does not matter why he is being paid, but only that he receives income from the very parties he is supposed to regulate.

Given MLDC's legal obligation to advocate for the permit applicants it represents (and MLDC's risk of liability if it falls short), it is the equivalent of a regulated entity. Thus, the conflict of interest review must consider the Commissioner's total economic relationship with MLDC. As above, for purposes of the conflict of interest review, it does not matter why the Commissioner receives income from MLDC, but only that he is receiving income from an entity he regulates. Accordingly, *all* income Commissioner Brown receives or has received over the past two years from MLDC should be counted towards the 10 percent threshold requirement.

C. DIVESTITURE AND RECUSAL CANNOT CURE A CONFLICT OF INTEREST UNDER 40 C.F.R. § 123.25(C)

Neither the statute nor the rules allow a person to evade the conflict of interest prohibition by recusing themselves from specific permit decisions that involve a conflict, or by divestiture. First, the statutory provisions look back two years. This expressly negates divestiture or recusal as a cure to conflicts of interest and indicates that Congress was concerned with both an active conflict of interest and with intermittent conflicts that result from the "revolving door" practice, where industry executives can temporarily take on the role of an independent government regulator and then be rewarded after returning to private practice.

Second, recusal from specific permit determinations alone is insufficient to eliminate the conflicts. Permits issued pursuant to Section 402 are deeply affected by many non-permit and policy decisions vested in the Commissioner's office. Already, Commissioner Brown has found himself caught up in such conflicts. For instance, LD 154 currently before the Maine Legislature proposes to upgrade a segment of the lower Androscoggin River from Class C to Class B. During hearings over the bill MDEP provided testimony opposing the upgrade, because, among other reasons, it would result in more stringent effluent limitations on upstream dischargers – including specifically dischargers on upstream tributaries such as the "Little Androscoggin River." (Testimony of MDEP Deputy Commissioner Patricia Aho before the Joint Standing Committee on the Environment and Natural Resources, Feb. 8, 2011.) This position directly benefits the Oxford Resort Casino, which has proposed in its stormwater discharge permit application to divert most stormwater runoff from the facility away from adjacent (and ecologically fragile) ponds and into the Little Androscoggin River.

This is an example of the irreconcilable conflict between Commissioner's Brown's ownership of MLDC (and his prior role as MLDC President and consultant for the Oxford Resort Casino) and his duties as Commissioner to set Department direction and policy. In this case, the testimony was delivered by the Commissioner's appointed Deputy Commissioner, he was in the room while the testimony was provided, there is no department policy in place to wall off the Commissioner's office from this issue (or similar issues in any other watershed where MLDC has a client), and no indication was provided to the Committee that the Commissioner recused himself from consideration of LD 154.

There are many other bills now in the legislature that will have similar impacts on MLDC and its clients, including for example, LD 333 to eliminate MDEP's authority to regulate

municipal snow dumps and LD 1, the Governor's Regulatory Reform Proposal, which includes proposals to roll back state environmental standards to the federal minimum and many other reforms to the Department's policies and procedures. Thus, recusal from permitting decisions alone is insufficient to eliminate Commissioner Brown's ongoing conflict of interest

In closing, we urge the Administrator to expedite an investigation into the conflicts of interests now affecting the Maine Department of Environmental Protection because of Darryl Brown's new role as Commissioner. Clear and irreconcilable conflicts are already occurring and threaten the integrity of the § 402 permitting process in violation of federal law.

Please let me know if I can provide any further information.

Sincerely,

A handwritten signature in black ink, reading "Stephen F. Hinchman". The signature is fluid and cursive, with the first name "Stephen" and last name "Hinchman" clearly legible.

Stephen F. Hinchman, Esq., counsel for
The Androscoggin River Alliance.

Cc: Darryl Brown, Commissioner MDEP
William J. Schneider, Attorney General of Maine
Curt Spalding, Regional Administrator EPA Region 1
Ann Williams, EPA Region 1 Assistant Regional Counsel
Greg Dain, EPA Region 1

Enclosures:
Exhibits 1 -10

MEMORANDUM

TO: Beth Callahan, Maine Department of Environmental Protection
Bureau of Land and Water Quality
Division of Land Resource Regulation
Augusta, Maine 04333
Beth.Callahan@maine.gov

FROM: Terri J. Coolidge Marin, President Green and Mirror Ponds Association
tmarin@kidsconsortium.org

DATE: Friday, March 4, 2011

SUBJ: Comments/Draft Order, Application of BB Development,
LLC # L-25203-28-A-N/L-25203-TE-B-N

Stormwater Management / Watershed

I would argue that Winter Brook and Tripp Lake be included with the site plan watershed area. Winter Brook flows north out of Tripp Lake (Poland) into Hogan Pond and is directly affected by severe erosion on Rabbit Valley Road every spring, summer, winter and fall. The entire culvert area on Rabbit Valley Road (the entrance to Hogan Pond from the Brook) experiences significant erosion - enough to alter the growth of trees, the flow of the water, the width of the brook, and change of landscape on the edges of the brook.

The Androscoggin River and Hogan Pond have historically been known to "back-up" and "reverse" it's flow during high water/flood events, which then effects Winter Brook, Tripp Lake and the low lying areas in between. (Note: April 1, 1987 flood)

The applicant states that a small portion of Rabbit Valley Road is within the proposed project's watershed and has proposed to catch this stormwater runoff and send it through a wet pond for treatment. Treated stormwater will then flow to the Androscoggin River.

The applicant has proposed to catch stormwater runoff and send it down through the watershed where it will go through a culvert on Hogan Lane and enter Hogan Pond.

The applicant has proposed both wet pond areas to be treated and then flow into the Androscoggin River and Hogan Pond.

When the next high water/flood event occurs, stormwater from the proposed site has the potential to flow into Winter Brook and Tripp Lake and low lying areas in between.

MEMORANDUM

TO: Beth Callahan, Maine Department of Environmental Protection
Bureau of Land and Water Quality
Division of Land Resource Regulation
Augusta, Maine 04333
Beth.Callahan@maine.gov

FROM: Richard Auren, Hogan Whitney Ponds Association
hoganpondlane@gmail.com

DATE: Friday, March 4, 2011

SUBJ: Comments/Draft Order, Application of BB Development,
LLC # L-25203-28-A-N/L-25203-TE-B-N100 Mile Limit

100 Mile Limit

The argument over the 100 mile limit seems silly. Whenever has such a measurement meant miles over developed roads? My guess is never. Logically the measurement involves configuring a compass for 100 miles using the scale on a map, sticking the point on the proposed casino location and drawing a circle. Doing such proves the proposed location is short of the 100 mile limit. Seems black and white to me. Legally the casino cannot be placed on Pigeon Hill.

Conflict of Interest Between Maine DEP and BBE

The casino proposal design was created when Darryl Brown was president of the Maine Land Development Consultants, the design firm used by Black Bear Enterprises. Forward the clock and Governor LePage appoints Mr. Brown Commissioner of the DEP, the agency issuing the permit for his design. How cannot this be a conflict of interest? Is one to assume that Mr. Brown is to have a nonbiased opinion reviewing his own design? Please, how naive do you think people are?

Inexperienced Casino Operator

Representatives from the Hogan Whitney Pond association had a meeting with Black Bear enterprises on February 18th 2011. During this meeting BBE informed the association members that they were real close to choosing an operator and we would be pleased with their choice. The association would assume that the chosen operator would be well qualified in all aspects of operations. This is most important given the town of Oxford is completely under qualified and understaffed to deal with and manage the changes the casino will bring to the area. We need an operator who will manage the casino with authority. Appointing an under qualified operator and expecting them to learn through the 'school of hard knocks' is a recipe for disaster.

Callahan, Beth

From: Mary Taylor [mary.taylor@yahoo.com]
Sent: Friday, March 11, 2011 4:50 PM
To: Callahan, Beth
Cc: mary.taylor@yahoo.com
Subject: Comments/Draft Order, Application of BB Development, LLC # L-25203-28-A-N/L-25203-TE-B-N

MEMORANDUM

TO: Beth Callahan, Maine Department of Environmental Protection
Bureau of Land and Water Quality
Division of Land Resource Regulation
Augusta, Maine 04333
Beth.Callahan@maine.gov

FROM: Mary H. Taylor, Esq.

DATE: Friday, March 4, 2011

SUBJ: Comments/Draft Order, Application of BB Development,
LLC # L-25203-28-A-N/L-25203-TE-B-N

1. The impact on the public water supply, wells in the area, and groundwater, has not been adequately addressed. It is my understanding that the applicant intends to draw water from the same source as the Oxford Water District. The Maine DEP should require an analysis of the impact on the public drinking water supply as well as other wells in the area. The required pump tests and On-Site Well Use and Monitoring Plan should be required before approval of the application. The DEP cannot possibly make the finding that it has in the draft order, that "the proposed project will not have an unreasonable adverse effect on the groundwater quality," without test information regarding impact to Water Supply and Ground water.
2. This finding is also based on anticipated usage for Phase 1 only. The cumulative, overall impact of the entire planned project must be considered and accounted for.
3. Based on the foregoing reasons, the DEP should deem the application incomplete.
4. Lastly, the ME DEP should defer to federal jurisdiction to the maximum extent possible and recuse itself from the licensing of this project due to the apparent conflict of interest of Mr. Darryl Brown, DEP Commissioner.